A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR 33

Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J

Misc. Appeal No.525/2006

Royal Sundaram Alliance Insurance Company.

Versus

Lakhan Lal and 4 others

ORDER

Post for 6 -08-2007

Sd/-
Dilip Raosaheb Deshmukh
Judge

A.F.R.

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HIGH COURT OF CHHATTISGARH AT BILASPUR (C.G.)

MISC. APPEAL (C) No. 525 of 2006

APPELLANT : Royal Sundaram Alliance Insurance Company, 1st Floor, Rachna Trade Estate, SNDT Crossing, Plot No. 64, Law College Road, Pune, (MS) Through-The Branch Manager, 1st Floor, Chawala Complex, Near New Bus Stand, Pandri Raipur C.G. **(Non-Applicant no.3)**

Versus

RESPONDENTS :

1. Lakhan Lal S/o Late Budhu Ram, aged about 55 years,

2. Punni Bai, W/o Lakan Lal Patel, aged about 53 years.

3. Smt. Narbadia Bai W/o Late Budhu Ram, aged about 70 years,

All R/o Village Amodi, Post Amodi, Via Kharora, Tahsil Arang, District Raipur (C.G.) **(Claimants)**

4. Tulas Ram Nishad S/o Shri Toran Lal Nishad, aged about 21 years **(Driver Non-applicant No.1)**

5. Punit Ram Sahu S/o Ram Singh, aged about 37 years, **(Owner – Non-applicant No.2)**

Both R/o Village Amodi, Post Amodi, P.S. Kharora, Tahasil Arang, Distt. Raipur (C.G.)

MEMO RANDUM OF APPEAL UNDER SECTION 173 OF THE MOTOR VEHICLES ACT 1988

Present:

Shri Sachin Singh Rajput, counsel for the appellant.
Shri Sudhir Verma, counsel for respondents No.1 to 3.
Shri Prakash Tiwari with Shri C.R.Sahu, counsel for the respondent No.4 & 5.

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ORDER
(Passed on 06.08.2007)

This appeal by the Insurer is directed against the award dated 6.10.2006 passed in Claims Case No. 46 of 2006 by the 8th Additional Motor Accidents Claims Tribunal (F.T.C.), Raipur (hereinafter referred as the M.A.C.T.)

2. Admitted facts are that for the accidental death of Lekhram, aged 15 years on 27.1.2006, the M.A.C.T. awarded compensation of Rs.1,17,500/-. Tulas Ram, respondent No.4, was driving the Tractor No.C.G.04/D 0167 to which a Trailer No. C.G. 04 D/168 was attached and possessed a valid driving licence. The Insurance policy covers use of the Tractor/Trailer only for Agricultural and Forestry purposes and covers the risk of the paid driver and/or cleaner. The Tractor/Trailer was owned by Punitram Sahu, Respondent No.5, on the date of accident.

3. Claimants had, in their application under Section 166 of the Motor Vehicles Act, 1988 (henceforth 'the Act'), pleaded that due to rash and negligent driving by Tulas Ram, Lekhram, who was sitting by the side of the driver fell and died.

4. The respondents No.4 and 5, being the driver and the owner of the Tractor Trailer, denied the pleadings in *toto* in their written statement.

5. The appellant/Insurer while denying the claim as also the liability to pay compensation pleaded that Lekhram was seated on the Tractor with the Driver which was a fundamental breach of the insurance policy, and

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therefore, the Insurance-Company was liable to be exonerated. In the alternative, it was also contended that even if it was held that Lekhram was travelling on the Trailer, he was a gratuitous passenger for whom no extra premium was paid, and therefore, the liability to pay compensation could not be fastened on the Insurance-Company.

6. The M.A.C.T. placing implicit reliance on the testimony of the driver and disbelieving claimant-Lakhanlal's evidence on the ground that he did not see the accident held that the deceased Lekhram was seated on the Trailer at the time of the accident which had occurred due to rash and negligent driving of Tulas Ram. Since the driver possessed a valid driving licence, the Insurance-Company was liable to pay compensation as risk of third party was statutorily covered under the policy. It awarded compensation of Rs.1,17,500/- against the appellant/Insurance Company.

7. Shri Sachin Singh Rajput, learned counsel for the Insurance Company contended that the evidence of Tulas Ram ought to have been rejected as an afterthought because he sought permission and entered the witness box before the M.A.C.T. only after the closure of evidence by the parties It was further argued that in the first information report as also in the application under Section 166 of the Act, the claimants had pleaded that Lekhram was seated besides the driver. Having placed reliance on the F.I.R. and exhibited the same the claimants could not turn around and contend that it was not proved that Lekhram was seated on the Tractor besides the driver at the time of accident. Reliance was placed on Oriental Insurance Company Limited v. Premlata Shukla and others 2007 INDLAW SC 553 and National Insurance Co. Ltd. V.

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Bramaranbike and others, 2006 ACJ 671 while contending that since Lekhram was a gratuitous passenger, the Insurer was not liable to pay compensation.

8. On the other hand, Shri Prakash Tiwari, learned counsel for the respondents No.4 & 5 placed reliance on Rule 97 (7) of the M.P.Motor Vehicles Rules, 1994 (hereinafter referred to as the Rules) wherein carrying of labourers and the members of the family of agriculturists for the purpose of agriculture or any purpose connected with agriculture including sale and purchase of articles or agriculture was included. Reliance was placed on New India Assurance Co. Ltd. v. Dhanurjaya Khosla and others, 1988 ACJ 1065 while contending that since Lekhram was travelling in the Tractor as a helper, the insurer cannot escape liability to pay compensation. Shri Sudhir Verma, learned counsel for respondents No. 1 to 3 argued in support of the impugned award.

9. Having considered the rival contentions, I have perused the record. In order to properly appreciate the contentious issue whether the appellant/insurer was able to prove fundamental breach of the policy of insurance, it is necessary to look into the pleadings and the evidence led by the parties as also the contents of the policy. A perusal of the certificate-cum-policy issued by the appellant/insurer Ex.D.1 leaves no room for any doubt that the policy statutorily covered third party risk in respect of death or bodily injury to an accident, as provided under the Motor Vehicles Act, 1988 and also covered use for agricultural and forestry purposes. Besides the basic premium for the Tractor/Trailer, the premium for the risk of the driver and/or cleaner was also paid. In this

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manner, it is established that the Tractor and Trailer were both covered under the certificate-cum-policy of insurance by the appellant/insurer for the use of agricultural and forestry purposes and the risk of the driver of the Tractor and the cleaner being carried in the Trailer was also covered.

10. In the application filed by the claimants under Section 166 of the Act, it was specifically pleaded by the claimants that the deceased Lekhram had on 21.07.2006 gone as a coolie/labour in the Tractor owned by Punit Sahu and after filling paddy from the Krishi Upaj Mandi, Tilda, the Tractor being driven by Tulas Ram was returning with Lekhram. As against this, the appellant/insurer had merely denied the contents of paragraph 3 generally and there was no specific denial. Even the owner and the driver did not specifically deny the pleading in paragraph 3 of the application under Section 166 of the Act that the Tractor was returning after filling paddy from Krishi Upaj Mandi, Tilda and that Lekhram Patel was travelling in the Tractor as a coolie/labour. Under Order 8 Rule 5 sub-clause (1) of the C.P.C. every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. It is thus clear that the fact that the deceased Lekhram was travelling as a coolie/labour on the Tractor/Trailer is an admitted fact.

11. Tulas Ram Nishad, the driver of the Tractor has entered the witness box and deposed that Lekhram was seated in the Trailer and fell down upon sudden application of brakes by him. This testimony is wholly unrebutted in cross-examination. Tulas Ram had specifically denied the

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suggestion that Lekhram was seated on the Tractor with him and has reasserted that Lekhram was seated on the Trailer. He has further admitted, on a leading question being put by the appellant/insurer, that Lekhram had gone with him to the Krishi Upaj Mandi for agricultural purposes. Tulas Ram Nishad is a witness whose presence at the time of accident cannot be questioned since he was the driver of the Tractor/Trailer at the time of accident.

12. Shri Sachin Singh Rajput, learned counsel for the appellant/insurer argued that the testimony of Tulas Ram Nishad is an afterthought because he entered the witness box only after the closure of evidence by the parties. A perusal of the order sheets written by the M.A.C.T. would show that on 18.09.2006 the owner and the driver had, without adducing evidence declared their evidence closed and on the very next date i.e. 26.09.2006 the appellant/insurer had also closed its case after examination of witness Amit Shrivastava N.A.W.3. An application was filed on the same day by the owner and the driver for adducing evidence on the ground that due to inadvertence they had said on the earlier date that they would not adduce any evidence. This permission was granted and the testimony of Tulas Ram Nishad was recorded on 28.09.2006. In this manner, the testimony of Tulas Ram cannot be discarded as afterthought because he was the best witness to have seen the accident being the driver himself.

13. The testimony of claimant Lakhanlal A.W.1 was rightly discarded because he admitted not having seen the occurrence. Similarly, the testimony of Gulabchand Nishad A.W.2 also does not show as to whether

Lekhram was seated on the Tractor or on the Trailer. No specific question was asked to this witness in cross-examination as to whether Lekhram was seated on the Tractor with the Driver. Another factor which requires consideration is that the F.I.R. Ex.P.1, P.2 or the *Dehati Nalishi* Ex.P.3 was not lodged by this witness. The presence of Gulabchand Nishad A.W.2 is also not mentioned either in the *Dehati Nalishi* Ex.P.3 or in the F.I.R. Ex.P.1 & P.2. Therefore, the learned M.A.C.T. rightly placed reliance on the wholly unrebutted testimony of the driver Tulas Ram Nishad N.A.W.2 that Lekhram was seated in the Trailer at the time of accident.

14. The initial burden of proving breach of policy is on the insurer. Amit Shrivastav N.A.W.1, the claims in-charge of the appellant/insurer, admitted in cross-examination that the appellant/insurer did not get the matter investigated through their authorized investigator. His testimony that the risk of any person travelling in the Trailer was not covered under the policy of insurance is belied by the certificate-cum-policy of insurance Ex.D.1 itself since premium was paid to cover the risk for the driver as also the cleaner. Rule 97 sub-clause (7) of the Rules permits the use of a Tractor/Trailer registered in the name of agriculturist for the following purposes:

(i) for carrying labourers and the member of the family of agriculturist for the purpose of agriculture or any purpose connected with agriculture including sale and purchase of articles or agriculture.

(ii) for carrying persons at the time of Mela, Markets, Religious Functions, Marriages and at other ceremonial

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occasions provided that the number of person so carried shall not exceed 20 at a time.

Thus, presence of Lekhram on the Trailer at the time of accident was also not in contravention of above Rules.

15. No question has been asked by the appellant/insurer in cross-examination to Tulas Ram Nishad N.A.W.1 i.e. the driver of the vehicle that Lekhram was not undertaking the work of the cleaner of the Tractor/Trailer. It was the duty of the insurance-Company to elicit all such facts either by adducing evidence of its investigator or by cross-examination of the witness. Nothing of this sort was done by the appellant/insurer. In the World Book Dictionary, the word "cleaner" means a person whose work is to keep a tool or machine clean and to remove dirt, grease or stains on it. Considering the age of Lekhram being only 15 years, it would be appropriate to presume that Lekhram was also working as a cleaner or helper to the driver of the Tractor/Trailer.

16. From the foregoing discussion, it emerges that Lekhram was travelling as cleaner/helper on the Trailer being used for agricultural purpose and driven by Tulas Ram Nishad, a duly licenced driver at the time of accident and met with an accidental death due to rash and negligent driving by Tulas Ram Nishad. The case law in **Oriental Insurance Company Limited v. Premlata Shukla and others** (supra) cited by the counsel for the appellant/insurer is clearly distinguishable and does not come to the aid of the appellant/insurer because it is not a case where the respondents i.e. driver and owner of the Tractor/Trailer had in

any manner turned around from a plea taken by them or from a document relied upon by them. In the fact and circumstances of this case, breach of policy is a matter squarely between the insurance-Company and the owner and the driver of the vehicle. The contents of the F.I.R. Ex.P.1 and P.2 or *Dehati Nalishi* Ex.P.3 by itself would not be sufficient to discard the testimony of Tulas Ram because Lakhanlal, who had lodged the *Dehati Nalishi* Ex.P.3, was not an eye-witness. Further the case law cited by the appellant/insurer in **National Insurance Co. Ltd. V. Bramaranbike and others** is also distinguishable since in the present case, Lekhram was employed by the owner of the Tractor/Trailer as a helper and was travelling on the Trailer which was under a valid policy of insurance and and was neither travelling on the Tractor nor as a gratuitous passenger.

17. Thus, the following points emerge from the foregoing discussions:

A) That the Tractor/Trailer was under a valid policy of insurance issued by the appellant/insurer at the time of accident.

B) That the Tractor/Trailer was being used for agricultural purpose at the time of accident.

C) That the driver of the Tractor/Trailer possessed a valid driving licence.

D) The statutory liability of the insurer was covered under the policy of insurance Ex.D.1 and premium to cover the risk of the paid driver and helper was paid.

E) That Lekhram was travelling in the Trailer and not on the Tractor at the time of the accident and was not a gratuitous passenger but was a labourer/helper employed by the owner of the Tractor.

18. The learned M.A.C.T. has thus rightly fastened the liability on the appellant/insurer on the ground that it had failed to prove any fundamental breach of the policy of insurance. In the result, the appeal being devoid of any merit fails and is dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge
.08.2007